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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91209617
Party	Defendant Debra Wiseberg
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Xikar, Inc.,	1	
	§	
	§	
Opposer,	§	Opposition No. 91209617
	§	
v.	§	Mark: Cicar
	§	
Debra Wiseberg d/b/a	§	Serial No. 85/652496
Bram Warren Company,	§	
	§	
Applicant.	§	
	J	

APPLICANT AND COUNTERCLAIM PLAINTIFF'S REPLY BRIEF IN SUPPORT OF
MOTION FOR RECONSIDERATION OF DECISION ON MOTION

Debra Wiseberg, Applicant and Counterclaim Plaintiff (hereafter "Applicant") hereby responds to Xikar, Inc., a Kansas corporation, Opposer and Counterclaim Defendant's (hereafter "Opposer") opposition response to her motion. The Applicant filed the Motion for Reconsideration of Decision on Motion (Dismissal of Fraud Claim) for the following reasons: 1) as a matter of record to protect her right to plead the fraud claim and others against the Opposer, and request the Board reconsider their decision; 2) to put forth arguments in response to the Board's January 20, 2015 decision to dismiss the Applicant's fraud claim against the Opposer for failure to state a claim; 3) to request the Board allow the Applicant to amend the fraud claim against the Opposer to their specifications since they were silent on such matter; and 4) I have also included a brief clarification of the Applicant's argument regarding standing to bring other claims such as the false association claim in foot note 1 on page 2 of the Applicant's motion for reconsideration, in case the Board misconstrued my argument on standing and the right to bring such claims and will reconsider their decision concerning such claims.

The Opposer has stated in their opposition response, that my motion should be denied because I have not included the language that the Board erred in their decision within my motion. I stated on page 4 of my motion that “I believed the use of the terms “knowingly” and “fraudulently” within the fraud claim contained in the Applicant’s Amended Counterclaim dated August 14, 2014 was sufficient to signify the Opposer’s intent, since “fraudulent” implies an intent to deceive and “knowingly” implies such intent was with knowledge”. In addition, the Applicant stated on page 6 of the Applicant’s motion for reconsideration that “it is my belief that the Applicant’s fraud claim against the Opposer was sufficiently pled in the Applicant’s Amended Counterclaim filed August 14, 2014, even still, the Applicant has considered the Board’s decision in this matter dated January 20, 2015 and has concurrently filed a motion for leave to amend pleading and a proposed amended fraud counterclaim to include additional language and to more specifically plead such claim”. The Applicant has stated within her motion that the Applicant believed the original fraud claim was sufficiently pled. It is not for the Applicant to instruct the Board that they erred in their decision, when I believe their decision was based on the Board’s interpretation of a heightened requirement to plead a fraud claim since the In Re Bose decision nor can the Applicant instruct the Board that they erred when considering my argument on standing because I’m not sure what the Board construed from such argument, that was put forth to argue my right to bring claims such as the false association claim. Instead the Applicant has respectfully requested the Board reconsider their decision to dismiss the Applicant’s fraud claim based on my arguments in response to their decision and allow her to amend such fraud claim to their specifications and I have also tried to clarify arguments in regards to other claims. The Applicant has simply protected her rights by filing this motion. The Applicant has filed an amended fraud claim attached to her motion for leave to amend, to satisfy

the Board, since it is the Board that will decide during this proceeding whether or not the Applicant can bring the fraud claim against the Opposer.

The Opposer's counsel has attempted to undermine the fraud claim against the Opposer by oversimplifying such claim. Though the fraud claim against the Opposer includes the elements that Kurt Van Keppel, an individual did not have a bona-fide intention to use the mark in commerce nor held ownership of the mark or the products sold under the mark, the fraud claim is not based on those facts, but on the fraudulent actions and intent of both Kurt Van Keppel and the Opposer in the procurement and maintaining of the registration of the "Xikar" mark and the unentitled rights associated with such registration. The Applicant prays the Board will thoroughly review the fraud claim against the Opposer and allow the Applicant to plead such claim and not be swayed by the Opposer and their counsel's tactics to discredit such claim.

This would be the first amendment to the fraud claim. The Opposer and their counsel have tried to mislead the Board by stating in their opposition response to my motion that an amendment to the fraud claim would constitute "a third bite in fact – at the proverbial apple" and that such would be prejudicial against the Opposer. It is not prejudicial to the Opposer for the Applicant to amend the fraud claim against them. It would be prejudicial to the Applicant if the Applicant were not allowed to amend the fraud claim against the Opposer. The statutes and laws governing this proceeding allow for the amendment of a pleaded ground. Furthermore, a party is allowed to bring a claim learned during a proceeding and as such, should be allowed to amend such claim as they would amend any claim with the Board's leave. Each individual ground within the Applicant's counterclaim stands alone, whether it is the generic claim or the fraud claim. There are two separate grounds within the Applicant's counterclaim. The first ground is the generic claim against the Opposer which was originally filed on April 15, 2013 and was

amended only once by the Applicant within her amended counterclaim filed on August 14, 2014.

The amended generic claim was deemed sufficiently pled by the Board in their decision dated January 20, 2015 and was answered by the Opposer on February 9, 2015. The second ground is the fraud claim against the Opposer which was pled by the Applicant for the first time within the Applicant's Amended Counterclaim filed on August 14, 2014. The only amendment to the fraud claim is the present amendment now before the Board, filed by the Applicant on February 19, 2015 and attached to her motion for leave to amend pleading. No claim pled and filed by the Applicant against the Opposer has been amended more than once. The Opposer has attempted to group all of the pleaded grounds within the Applicant's counterclaim together to create the illusion that the Applicant is filing a second amendment to a claim, when this is not the case.

The Opposer has continuously tried to distract from the matter at hand and discredit the Applicant by maligning the Applicant and her arguments within documents filed with the Board every time the counterclaim is at issue. They have done so by attacking the Applicant in order to put the Applicant on the defensive and distract from the actual matter at hand which is the counterclaim against the Opposer to cancel the registered trademark "Xikar" for "cigar cutters". The Opposer has twice asked for sanctions against the Applicant within documents filed in connection to the Applicant's counterclaim against the Opposer. The Applicant believes that this is nothing more than a tactic by the Opposer to discredit the Applicant and her arguments and to undermine the Applicant's claims against the Opposer and the Applicant's rights in this matter.

The Opposer's misleading and meaningless evidence attached to their opposition response to my motion for reconsideration as the Opposer's Exhibit "A" and Exhibit "B" proves absolutely nothing. The Applicant hopes to prove through evidence that Kurt Van Keppel, an individual did not hold the right and control over the use of the "Xikar" mark" as pled by the

Applicant within paragraph two of the amended fraud claim; by proving Kurt Van Keppel, an individual did not own nor have a cigar cutter to sell under the "Xikar" mark nor did he have control over the use of the "Xikar" mark in commerce. The Opposer has attached their entire supplemental responses to the Applicant's First Set of Interrogatories¹(pp. 17-18) as evidence to mislead the Board into believing such is proof that Kurt Van Keppel, an individual used the mark in commerce and that because of this the Applicant is aware of such use and has filed the fraud claim without cause. The Opposer has also attached a copy of the Assignment of the "Xikar" mark between Kurt Van Keppel and the Opposer and if this somehow proves use of the mark by Kurt Van Keppel, an individual or anything other than the fact that both parties mislead the USPTO with the intent to deceive the USPTO when they filed such document. In addition, the Opposer did not include any claim of use of the mark by Kurt Van Keppel in their original response to the Applicant's First Set of Interrogatories for the Opposer and only included such language that "Mr. Van Keppel's first sale of the Xikar cutter was to Alexander Kemper" within their supplemental responses to the Applicant's First Set of Interrogatories and not within the original response to such interrogatories and only included such statement after discovery had closed and after they received the Applicant's Second Set of Interrogatories in which the Applicant asked direct questions concerning use of the mark by Kurt Van Keppel. Even if Mr. Van Keppel sold a cigar cutter to a man named Alexander Kemper such would not signify that Kurt Van Keppel personally owned the "cigar cutter" which he sold nor had any rights as an individual to the "Xikar" mark or its goods. The Applicant hopes to prove through evidence, if the Board allows the Applicant to bring the fraud claim against the Opposer, that the claims made by the Opposer of use of the mark by Kurt Van Keppel, an individual in their supplemental

¹The Applicant objects to the Opposer's introduction of the Applicant's interrogatories as evidence. Unfortunately instead of correctly answering the interrogatories, many of the Opposer's current responses to the Applicant's interrogatories are basically testimony on behalf of the Opposer and/or unanswered.

answer to the Applicant's First Set of Interrogatories, is yet another attempt by the Opposer to mislead the USPTO and the Board. The Applicant intends to request in a future motion, as necessary, that the Board allow her to re-open discovery (TBMP §403.04; Fed. R. Civ. P. 6(b)) for the purpose of allowing the Applicant to take additional discovery on two matters: 1) to allow the Applicant to request additional discovery from the Opposer to obtain additional evidence, if needed, to disprove and discredit the claims and statements made by the Opposer within their supplemental answers given on March 12, 2014 to the Applicant's First Set of Interrogatories which were sent to the Opposer on September 27, 2013, well before discovery closed; and 2) to allow the Applicant to obtain discovery in connection with the Opposer's imitation of the Applicant's Colloquy Striker™ ashtray which occurred late last year in 2014 or early 2015, two years (1st extension to oppose filed November 14, 2012) after the Opposer filed their opposition claiming likelihood of confusion between the Applicant's mark "Cicar" and their mark "Xikar" and the parties products (the Applicant considers this a fraudulent act by the Opposer). The Applicant will also file, as needed, a Motion to Compel discovery responses from the Opposer.

It appears by the Opposer's opposition response to my motion for reconsideration that they cannot keep up with their own arguments and statements or they are again trying to mislead the Board as to the Applicant's claims. The Opposer stated on page 5 of their opposition response to my motion for reconsideration that the trademark "Xikar" "is not Mayan, Spanish, Taino or any other language that BWC has tried to connect it to". To clarify the matter for the Board and to instruct the Opposer as to their own arguments and statements, the Opposer is the only party who has claimed that the mark "Xikar" was procured from a Taino word and a Mayan word, such claims of origin apparently change in consideration of the impression the Opposer tries to project at any given time. The Applicant has never claimed the Opposer's mark "Xikar"

was either Taino or Spanish. The Applicant has only claimed that the Opposer's mark "Xikar" is Mayan. I will not argue the facts of my case because this is not the forum for such argument. Let me remind the Opposer that the Applicant is not required to try a claim in order to plead a claim, but it appears the Opposer and their counsel would like the Applicant held to this standard.

Objection to the Opposer's request for Sanctions against the Applicant.

The Opposer has requested within their opposition response to the Applicant's Motion for Reconsideration of Decision on Motion (Dismissal of Fraud Claim) that the Applicant be sanctioned. This is the second time the Opposer has requested sanctions against the Applicant in filings concerning the counterclaim. The Applicant has not violated Fed. R. Civ. P. 11 and the sanctions requested by the Opposer would be unjust and unwarranted. It is also improper for the Opposer to bring a separate and serious matter in a response filing that is not contained within the original motion filed. I object to the inclusion of this entire matter involving the Opposer's second request for sanctions against the Applicant that has been improperly filed by the Opposer and is unwarranted. The Opposer and their counsel have repeatedly tried to paint a false picture as if they are the victims of the pro se Applicant and they need rescuing. The Opposer filed this litigation and forced the Applicant and her predecessor in interest into litigation. It is the Applicant and her predecessor in interest that have been the hapless victims of the Opposer.

CONCLUSION AND REQUEST

The Applicant has filed this motion for reconsideration as a matter of record to protect and defend her rights and pleadings in regards to the counterclaim against the Opposer and to request the Board reconsider their decision to dismiss the fraud claim and possibly their decision regarding other claims. The Opposer has twice requested sanctions against the Applicant when the counterclaim against the Opposer has been at issue. While I can see that both sanctions

requested by the Opposer would be quite beneficial for the Opposer, as they would prevent the Applicant from litigating this case and the fraud claim, the requests are unwarranted. I respectfully request the Board deny the Opposer's request for sanctions against the Applicant.

I respectfully request the Board reconsider their decision to dismiss the Applicant's fraud claim and allow the Applicant to amend the fraud claim against the Opposer and accept into the record the Applicant's Second Amended Counterclaim attached to her motion for leave to amend (fraud) pleading filed concurrently with the motion for reconsideration of decision on motion.

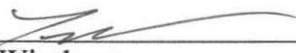
Dated: March 18, 2015

Respectfully submitted,

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CERTIFICATE OF FILING


I hereby certify that this Reply Brief was filed with the United States Patent and Trademark Office, Trademark Trial and Appeal Board by ESTTA on March 18, 2015.

By: 
Debra Wiseberg

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Reply Brief was sent to the counsel for the Opposer by the United States Postal Service, first class mail on March 18, 2015 to the following address:

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